

boards, taken ex parte and prior to the initiation of the election contest in the House, are incompetent as evidence and will not be considered by the Committee on Elections.

In *Hicks v Dondero* (§53.1, *infra*), a 1945 contest, the contestant submitted two copies of transcripts of proceedings before the Wayne County, Michigan Canvassing Board, which were held prior to the initiation of his election contest in the House. The Committee on Elections ruled that such transcripts were entirely *ex parte* and incompetent as proof of any issues urged by contestant.

Testimony at State Inquiry

§ 34.4 A committee on elections stated that it was not bound by the actions of a state court in supervising a recount; but the committee denied contestant's motion to suppress testimony obtained at a state inquiry where the contestant had initiated the state recount procedure and would be estopped from offering rebuttal testimony as to the result of the recount.

In *Kent v Coyle* (§46.1, *infra*), proceedings took place as described above. A partial recount had been conducted by a state

court pursuant to state law; but a committee on elections held that contestant had failed to sustain the burden of proof of fraud where a discrepancy between the official returns and the partial recount was inconclusive.

§ 35. Burden of Proof

Under the Federal Contested Elections Act, the burden is on contestant to prove that the election results entitled him to contestee's seat, even where the contestee fails to answer the notice of contest or otherwise defend as provided by such act,⁽⁶⁾ and even in opposition to a motion to dismiss submitted by contestee in advance of submission of formal evidence.⁽⁷⁾

Administration of Oath as Prima Facie Evidence of Right to Seat

§ 35.1 The administration of the oath to the contestee may establish his prima facie right to the seat.

In the 1965 Mississippi election contest of *Wheadon et al. v*

6. 2 USC §385.

7. See *Tunno v Veysey*, discussed in §35.7, *infra*.

Abernethy et al. [The Five Mississippi Cases] (§61.2, *infra*), the committee report and comments by members of the committee, during debate on the resolution dismissing the contest, suggested that the Committee on Elections regarded the administration of the oath to the contestees as establishing their *prima facie* right to the seats.⁽⁸⁾

Standard of "Fair Preponderance of Evidence"

§ 35.2 In an election contest, contestant has the burden of proof to establish his case, on the issues raised by the pleadings, by a fair preponderance of the evidence.

In *Scott v Eaton* (§50.2, *infra*), a 1940 California contest, an elections committee summarily ruled that a contestant had not established by a fair preponderance of the evidence that contestee had violated a California statute or the Federal Corrupt Practices Act,

8. See also the debate on H. Rept. No. 89-602 disposing of the election contest of *Peterson v Gross* (§61.3, *infra*), for more authority that the administration of the oath establishes a *prima facie* right to the seat, with resulting evidentiary burdens imposed on the contestant. 111 CONG. REC. 26499, 89th Cong. 1st Sess., Oct. 11, 1965.

or that any such violation directly or indirectly prevented contestant from receiving a majority of votes cast.⁽⁹⁾

Burden of Showing Results of Election Would Be Changed

§ 35.3 In the absence of a showing that the results of the election would be changed, lack of knowledge of registration laws and improper enforcement by officials charged with their administration are not such irregularities as will void the results of an election.

In *Wilson v Granger* (§54.5, *infra*), a 1948 Utah contest, the majority report of the Committee on House Administration acknowledged "widespread and numerous errors and irregularities in many parts of the district," but nevertheless upheld the 104 vote lead of the contestee because the correct result of the election was not affected by the irregularities shown. The House agreed to a resolution dismissing the contest.

§ 35.4 Where the contestant alleges that procedural requirements in an election have not been complied with,

9. As to the "fair preponderance" standard, see also *Gormley v Goss*, a 1934 Connecticut contest (§47.9, *infra*).

he has the burden of showing that, due to fraud and irregularity, the result of the election was contrary to the clearly defined wish of the constituency involved.

In *Clark v Nichols* (§ 52.1, *infra*), a 1943 Oklahoma contest, the Committee on Elections determined that contestant had proven certain irregularities relating to the failure of local officials in certain precincts to keep registration books and to comply with various administrative requirements imposed by state law, but dismissed the contest for failure of the contestant to bear the burden of showing fraud and irregularity by any election official whereby contestant was deprived of votes.

§ 35.5 A contestant who alleges that voters had been registered who did not reside in the precincts where registered must present such evidence of these irregularities as to leave no doubt of their existence.

In the 1951 Pennsylvania contested election case of *Osser v Scott* (§ 56.5, *infra*), the contestant's testimony enumerated instances where registrants had given fictitious residence addresses, and indicated that as to such registrants contestant had filed

some 2,000 "strike-off petitions." The committee, however, found that no evidence had been presented to show that any of the illegal registrants had voted for the contestee. Thus, the committee concluded that the contestant had not presented sufficient evidence to impeach the returns.

§ 35.6 An elections committee will recommend dismissal of a contest where there is no evidence that the election was so tainted with the misconduct of election officers that the true result cannot be determined.

In the 1951 Pennsylvania contested election case of *Osser v Scott* (§ 56.5, *infra*), the contestant contended, as stated in the report, that he was unable to have "honest-to-goodness Democrats file for minority inspector [poll watchers]" and that the Republican Party "will register persons as Democrats in order to file them for minority inspector and to complete the election board." However, the committee recommended dismissal, which the House subsequently agreed to, because no evidence was presented to show "that the election was so tainted with fraud, or with the misconduct of the election officers, that the true result cannot be determined."

§ 35.7 The requirement that the contestant in a contested election case make a claim to the seat carries with it the implication that the contestant will offer proof of such nature that the House of Representatives acting on his allegations alone, could seat the contestant.

Under the new contested election statute, contestant has the burden of resisting contestee's motion to dismiss, prior to the submission of evidence and testimony, by presenting sufficient evidence that the election result would be different or that contestant is entitled to the seat. Thus, in the 1971 California election contest of Tunno v Veysey (§64.1, *infra*), the committee report recommended dismissal of the contest where the contestant merely alleged that election officials had wrongfully and illegally canceled the votes of 10,000 potential voters, without any evidence as to how these potential voters would have voted.

The committee report noted the following burden of presenting evidence:

Under the new law then the present contestant, and any future contestant, when challenged by motion to dismiss, must have presented, in the first instance, sufficient allegations and evi-

dence to justify his claim to the seat in order to overcome the motion to dismiss.

The report continued:

The major flaw in the contestant's case is that he fails to carry forward with his claim to the seat as required by the precedents of the House of Representatives and the Federal Contested Elections Act. A bare claim to the seat as the contestant makes in his notice of contest without substantiating evidence ignores the impact of this requirement and any contest based on this coupled with a request for the seat to be declared vacant must under the precedents fail. The requirement that the contestant make a claim to the seat is not a hollow one. It is rather the very substance of any contest. Such a requirement carries with it the implication that the contestant will offer proof of such nature that the House of Representatives acting on his allegations alone could seat the contestant.

That the contestant in the present case fails to do this is quite clear. If all of his allegations were found to be correct he would still not be entitled to the seat. It is perhaps stating the obvious but a contest for a seat in the House of Representatives is a matter of most serious import and not something to be undertaken lightly. It involves the possibility of rejecting the certified returns of a state and calling into doubt the entire electoral process. Thus the burden of proof placed on the contestant is necessarily substantial.

The House agreed to a resolution dismissing the contest.⁽¹⁰⁾

10. This was the first election contest arising under the present Federal

Burden of Establishing Claim to Seat

§ 35.8 Merely showing that some voters have been precluded from voting through errors of the election officials does not satisfy the contestant's burden of establishing his claim for the seat.

In the 1971 California election contest of *Tunno v Veysey* (§ 64.1, *infra*), the contestant alleged that the election officials had wrongfully and illegally canceled the registration of approximately 10,000 voters. However, the contestant did not show how these potential voters would have voted, and the election committee, after expressing a hesitancy to invalidate an election under these circumstances, held that the contestant had not carried through on his burden of establishing his claim to the seat under the Federal Contested Elections Act [specifically, 2 USC §§ 382, 383] and the precedents of the House.

Allegations of Improper Expenditures

§ 35.9 A contestant has the burden of proof with respect to his allegations of im-

Contested Elections Act, 2 USC §§ 381 et seq.

proper campaign expenditures by contestee.

In *Lovette v Reece* (§ 47.11, *infra*), a 1934 Tennessee contest, the committee found that contestant's allegations of improper campaign expenditures by contestee were based on hearsay evidence related to other elections, and that the contestant had failed to sustain his burden of proof.

Evidence Not Compelling Examination of Ballots

§ 35.10 To entitle a contestant in an election case to an examination of the ballots, he must establish (a) that some fraud, mistake or error has been practiced or committed whereby the result of the election was incorrect, and a recount would produce a result contrary to the official returns; and (b) that the ballots since the election have been so rigorously preserved that there has been no reasonable opportunity for tampering with them.

In *O'Connor v Disney* (§ 46.3, *infra*), a 1932 Oklahoma contest, a committee on elections refused to conduct a partial recount where contestant had failed to sustain the burden of proving fraud or irregularities sufficient to change

the result of the election, and of proving such proper custody of ballots as to reasonably prevent tampering with them.

§ 36. Presumptions

Official Returns as Presumptively Correct

§ 36.1 A contestant in an election contest must overcome the prima facie evidence of the correctness of the election as established by the official returns.

In the 1934 Illinois election contest of Weber v Simpson (§47.16, *infra*), after the contestant examined the tally sheets in all of the 516 precincts of the district and found discrepancies in 128 of the precincts, he requested that the elections committee order a recount based on the discrepancies shown. The committee denied this request, finding no evidence of irregularities, intimidation, or fraud in the casting of ballots, concluding that “contestant has failed to overcome the prima facie case made by the election returns upon which a certificate of election was given to the contestee.”

§ 36.2 The burden is on the contestant to present sufficient evidence to rebut the

presumption that official returns are proof of the result of an election.

In the 1951 Pennsylvania contested election of Osser v Scott (§56.5, *infra*), the committee granted the contestant full opportunity for presenting testimony and hearing arguments of counsel supporting his claim, but still concluded that the contestant had not sustained his contention, stating:

The returns of the election . . . and the certificate issued to [the contestee] are presumptive proof of the result of that election which will prevail unless rebutted by proper evidence.

The House then agreed to a resolution that the contestee was duly elected and entitled to his seat.

Similarly, in O'Connor v Disney (§46.3, *infra*), the Committee on Elections applied the principle that the burden of coming forward with evidence to meet or resist the presumption of irregularity rests with the contestant, and found that contestant had failed to overcome the presumption of correctness of official returns.

§ 36.3 Election returns prepared by election officials regularly appointed under the laws of the state where the election was held are presumed to be correct until